CITIZENS BANKING COMPANY *v.* RAVENNA NATIONAL BANK.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 288. Argued March 16, 1914.—Decided June 8, 1914.

The failure by an insolvent judgment debtor and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such a levy, is not a final disposition of the property affected by the levy under the provisions of § 3a (3) of the Bankruptcy Act of 1898.

An insolvent debtor does not commit an act of bankruptcy rendering him subject to involuntary adjudication as a bankrupt under the Bankruptcy Act of 1898 merely by inaction for the period of four months after levy of an execution upon his real estate.

All of the three elements specified in § 3a (3) of the Bankruptcy Act of 1898 must be present in order to constitute an act of bankruptcy within the meaning of that provision.

Questions certified, 202 Fed. Rep. 892, answered in the negative.

THE facts, which involve the construction of § 3a of the Bankruptcy Act of 1898, are stated in the opinion.

Mr. G. Ray Craig, with whom *Mr. Edward H. Rhoades, Jr.*, and *Mr. John D. Rhoades* were on the brief, for Citizens Banking Company:

The failure by an insolvent judgment debtor for a period of one day less than four months after the levy of an execution upon his real estate to vacate or discharge such levy is not a "final disposition of the property" affected by such levy, within the provisions of § 3a (3) of the Bankruptcy Act.

An insolvent debtor does not commit an act of bankruptcy merely by inaction for a period of four months after the levy of an execution upon his real estate.

In support of these contentions, see *Re Baker-Ricketson Co.*, 97 Fed. Rep. 489; *Bogen* v. *Protter*, 129 Fed. Rep. 533; *Re Brightman*, 4 Fed. Cas. 136; *Colcord* v. *Fletcher*, 50 Maine, 398; *Re Empire Bedstead Co.*, 98 Fed. Rep. 981; *French* v. *Spencer*, 21 How. 228; *Re Heller*, 9 Fed. Rep. 373; *Jenney* v. *Walker*, 80 Oh. St. 100; *Metcalf* v. *Barker*, 187 U. S. 165; *Re National Hotel Co.*, 138 Fed. Rep. 947; *Poor* v. *Considine*, 6 Wall. 458; *Re Rome Planing Mill*, 96 Fed. Rep. 813; *Ex parte Russell*, 13 Wall. 664; *Re Seaboard Casting Co.*, 124 Fed. Rep. 75; *Thornley* v. *United States*, 113 U. S. 310; *Re Truitt*, 203 Fed. Rep. 550; *Re Vastebinder*, 126 Fed. Rep. 417; *Re Vetterman*, 135 Fed. Rep. 443; *Wilson* v. *City Bank*, 17 Wall. 473; *Wilson* v. *Nelson*,

183 U. S. 191; *Re Windt*, 177 Fed. Rep. 584; *Yturbide* v. *United States*, 22 How. 290.

Mr. A. T. Brewer for Ravenna National Bank:

The failure by an insolvent judgment debtor for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a "final disposition of the property," affected by the levy, under the provisions of § 3a (3) of the Bankruptcy Act of 1898, making the debtor subject to involuntary adjudication as a bankrupt under said § 3a (3), and it is not essential that the debtor shall do anything at all.

It is assumed that the judgment debtor, being insolvent, the levy constitutes a lien and works a preference. *Wilson* v. *Nelson*, 183 U. S. 191; *Bogen* v. *Protter*, 129 Fed. Rep. 533; *Folger* v. *Putnam*, 194 Fed. Rep. 793; *In re Tupper*, 163 Fed. Rep. 766.

The judgment levied on the property of Curtis on April 9, 1908, created a lien thereon in favor of the Citizens Bank of Norwalk, the judgment creditor, the judgment debtor being then insolvent.

This lien existed for a period one day less than four months, to-wit, until August 10, 1908, when the petition in involuntary bankruptcy was filed by the Ravenna National Bank, being so filed within four months, as August 9th was Sunday, these facts constituting a "final disposition" of said property by the bankrupt to the extent of the judgment.

To establish the bankruptcy through the foregoing facts it was not necessary for Cora M. Curtis to do anything. Her act of bankruptcy was therefore complete in all respects when the involuntary petition was filed and the adjudication by the district judge was fully authorized.

She permitted the judgment.

She was then insolvent.

The judgment worked a preference.

She did nothing to vacate it.

Except in bankruptcy the judgment was unassailable.

The involuntary petition alone prevented the consummation of the preference and the defeat of the main purpose of the Bankruptcy Law in securing an equal distribution among all creditors of the property of insolvent persons.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

Upon a petition filed in the District Court for the Northern District of Ohio by one of her creditors, Cora M. Curtis was adjudged a bankrupt. In addition to matters not requiring notice, the petition charged that within four months next preceding its filing the respondent committed an act of bankruptcy, in that (a), while insolvent, she suffered and permitted the Citizens Banking Company to recover a judgment against her for $1,598.78 and costs, in the Common Pleas Court of Erie County, Ohio, and to have an execution issued under the judgment and levied on real estate belonging to her, whereby the company obtained a preference over her other creditors, and (b) at the time of the filing of the petition, which was one day less than four months after the levy of the execution, she had not vacated or discharged the levy and resulting preference.

The company appeared in the bankruptcy proceeding and challenged the petition on the ground that it disclosed no act of bankruptcy, but the court, deeming that such an act was charged, overruled the objection, and, there being no denial of the facts stated in the petition, adjudged the respondent a bankrupt. The company appealed to the Circuit Court of Appeals, and that court, having briefly reviewed the opposing views touching the point in controversy (202 Fed. Rep. 892), certified the case here, with a request that instruction be given on the following questions:

"(1) Whether the failure by an insolvent judgment

debtor, and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a 'final disposition of the property' affected by such levy, under the provisions of section 3a (3) of the Bankruptcy Act of 1898.

"(2) Whether an insolvent debtor commits an act of bankruptcy rendering him subject to involuntary adjudication as a bankrupt, under the Bankruptcy Act of 1898, merely by inaction for the period of four months after the levy of an execution upon his real estate."

It will be observed that no reference is made to an accomplished or impending disposal of the property in virtue of the levy, although the mode of disposal prescribed by the local law is by advertisement and sale. 2 Bates' Ann. Ohio Statutes, §§ 5381, 5393.

The answers to the questions propounded turn upon the true construction of § 3a (3) of the Bankruptcy Act, which declares:

"Acts of bankruptcy by a person shall consist of his having . . . (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." Chapter 541, 30 Stat. 544, 546.

Looking at the terms of this provision, it is manifest that the act of bankruptcy which it defines consists of three elements. The first is the insolvency of the debtor, the second is suffering or permitting a creditor to obtain a preference through legal proceedings, that is, to acquire a lien upon property of the debtor by means of a judgment, attachment, execution or kindred proceeding, the enforcement of which will enable the creditor to collect a greater percentage of his claim than other creditors of the same class, and the third is the failure of the debtor to vacate or discharge the lien and resulting preference five days

before a sale or final disposition of any property affected. Only through the combination of the three elements is the act of bankruptcy committed. Insolvency alone does not suffice, nor is it enough that it be coupled with suffering or permitting a creditor to obtain a preference by legal proceedings. The third element must also be present, else there is no act of bankruptcy within the meaning of this provision. All this is freely conceded by counsel for the petitioning creditor.

The questions propounded assume the existence of the first two elements and are intended to elicit instruction respecting the proper interpretation of the clause describing the third, namely, "and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." It is to this point that counsel have addressed their arguments.

Without any doubt this clause shows that the debtor is to have until five days before an approaching or impending event within which to vacate or discharge the lien out of which the preference arises. What, then, is the event which he is required to anticipate? The statute answers, "a sale or final disposition of any property affected by such preference." As these words are part of a provision dealing with liens obtained through legal proceedings, and as the enforcement of such a lien usually consists in selling some or all of the property affected and applying the proceeds to the creditor's demand, it seems quite plain that it is to such a sale that the clause refers. And as there are instances in which the property affected does not require to be sold, as when it is money seized upon execution or attachment or reached by garnishment,[1] it seems equally

[1] See *Turner* v. *Fendall*, 1 Cranch, 117, 133; *Sheldon* v. *Root*, 16 Pick. 567; *Crane* v. *Freese*, 16 N. J. L. 305; *Green* v. *Palmer*, 15 California, 411, 418; 2 Bates' Ann. Ohio Statutes, §§ 5374, 5383, 5469, 5470, 5483, 5531, 5548, 5555.

plain that the words "or final disposition" are intended to include the act whereby the debtor's title is passed to another when a sale is not required. No doubt, the terms "sale or final disposition," explained as they are by the context, are comprehensive of every act of disposal, whether by sale or otherwise, which operates as an enforcement of the lien or preference.

But we do not perceive anything in the clause which suggests that the time when the lien is obtained has any bearing upon when the property must be freed from it to avoid an act of bankruptcy. On the contrary, the natural and plain import of the language employed is that it will suffice if the lien is lifted five days before a sale or final disposition of any of the property affected. This is the only point of time that is mentioned, and the implication is that it is intended to be controlling.

To enforce a different conclusion counsel for the petitioning creditor virtually contends that the clause has the same meaning as if it read "and having failed to vacate or discharge the preference at least five days before a sale or final disposition of any of the property affected, or at most not later than five days before the expiration of four months after the lien was obtained." But we think such a meaning cannot be ascribed to it without rewriting it, and that we cannot do. The contention puts into it an alternative which is not there, either in terms or by fair implication, and to which Congress has not given assent. Indeed, it appears that in the early stages of its enactment the bankruptcy bill contained a provision giving the same effect to a failure to discharge the lien within a prescribed period after it attached as to a failure to discharge it within a designated number of days before an intended sale, and that during the final consideration of the bill that provision was eliminated and the one now before us was adopted. This, of course, lends strength to the implication otherwise arising that the clause names the sole test of

when the lien must be vacated or discharged to avoid an act of bankruptcy.

The contention to the contrary is sought to be sustained by a reference to §§ 3b, 67c and 67f. But we perceive nothing in those sections to disturb the plain meaning of § 3a (3). It defines a particular act of bankruptcy and purports to be complete in itself, as do other subsections defining other acts of bankruptcy. Section 3b deals with the time for filing petitions in bankruptcy and limits it to four months after the act of bankruptcy is committed. It says nothing about what constitutes an act of bankruptcy, but treats that as elsewhere adequately defined. Sections 67c and 67f deal with the retrospective effect of adjudications in bankruptcy, the former declaring that certain liens obtained in suits begun within four months before the filing of the petition shall be dissolved by the adjudication, and the latter that certain levies, judgments, attachments and other liens obtained through legal proceedings within the same period shall become null and void upon the adjudication. Both assume that the adjudication will be grounded upon a sufficient act of bankruptcy as elsewhere defined, and give to every adjudication the same effect upon the liens described whether it be grounded upon one act of bankruptcy or another. And what is more in point, there is no conflict between § 3a (3) and the sections indicated. All can be given full effect according to their natural import without any semblance of interference between § 3a (3) and the others.

But it is said that unless § 3a (3) be held to require the extinguishment of the lien before the expiration of four months from the time it was obtained the result will be that in some instances the lien will not be dissolved or rendered null through the operation of §§ 67c and 67f, because occasionally the full four months will intervene before an act of bankruptcy is committed and therefore before a petition can be filed. Conceding that this is so,

one of the parties resided, this court is only concerned with the jurisdiction of the District Court as a Federal court; whether appellant is entitled to the relief sought is not a jurisdictional question in the sense of § 238.

When the matter in controversy is of the requisite value and diverse citizenship exists, the question is simply whether the case is cognizable in the particular District Court in which the case is brought.

Section 57, Judicial Code, makes suits to remove any encumbrance, lien or cloud upon title to real or personal property cognizable by the District Court of the district in which the property is situated regardless of residence of the parties and process for service of the non-resident defendants by notification outside of the district or by publication.

The provision in § 57, Judicial Code, respecting suits to remove clouds from title embraces a suit to remove a cloud cast upon the title by a deed or instrument which is void upon its face when such suit is founded upon a remedial statute of the State, as well as when resting upon established usages and practice of equity.

As construed by the highest court of Mississippi, § 975, Rev. Code of 1871 of that State entitles the rightful owner of real property in that State to maintain a suit to dispel a cloud cast upon the title thereto by an invalid deed, even though, under applicable principles of equity, it be void on its face.

In Mississippi, as declared by its highest court, the judgment of a special court of eminent domain may be challenged by a bill in equity upon the ground that the condemnation is not for a public purpose, and if other elements of Federal jurisdiction are present the case is one to remove cloud upon title and, under § 57, Judicial Code, the case is cognizable in the District Court of the district in which the property is situated although neither of the parties reside therein.

THE facts, which involve the jurisdiction of the District Courts of the United States under § 57, Judicial Code, are stated in the opinion.

Mr. Gregory L. Smith, with whom *Mr. Henry L. Stone* was on the brief, for appellant.

Mr. Rush Taggart, with whom *Mr. J. B. Harris* and *Mr. George H. Fearons* were on the brief, for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

By a bill in equity exhibited in the District Court the appellant seeks the annulment of three judgments of special courts of eminent domain in Harrison, Jackson and Hancock Counties, Mississippi, purporting to condemn portions of its right of way in those counties for the use of the appellee. According to the allegations of the bill, when given the effect that must be given to them for present purposes, the case is this: The appellant has a fee simple title to the land constituting the right of way and is in possession, and the appellee is asserting a right to subject portions of the right of way to its use under the three judgments, recently obtained. The appellant insists, for various reasons fully set forth, that the judgments were procured and rendered in such disregard of applicable local laws as to be clearly invalid, and that they operate to becloud its title. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, the right of way is within the district in which the bill was filed, and the appellant and appellee are, respectively, Kentucky and New York corporations. The prayer of the bill is, that the judgments be held null and void and the appellee enjoined from exercising or asserting any right under them. Appearing specially for the purpose, the appellee objected to the District Court's jurisdiction, upon the ground that neither of the parties was a resident of that district and that the suit was not one that could be brought in a district other than that of the residence of one of them without the appellee's consent. The court sustained the objection, dismissed the bill, and allowed this direct appeal under § 238 of the Judicial Code.

We are only concerned with the jurisdiction of the District Court as a Federal court, that is, with its power to entertain the suit under the laws of the United States.

Fore River Shipbuilding Co. v. *Hagg*, 219 U. S. 175; *United States* v. *Congress Construction Co.*, 222 U. S. 199; *Chase* v. *Wetzlar*, 225 U. S. 79, 83. Whether upon the showing in the bill the appellant is entitled to the relief sought is not a jurisdictional question in the sense of § 238 and is not before us. *Smith* v. *McKay*, 161 U. S. 355; *Citizens' Savings & Trust Co.* v. *Illinois Central Railroad Co.*, 205 U. S. 46, 58; *Darnell* v. *Illinois Central Railroad Co.*, 225 U. S. 243.

As the matter in controversy is of the requisite value and the parties are citizens of different States, the suit manifestly is within the general class over which the District Courts are given jurisdiction by the Judicial Code, § 24, cl. 1; so the question for decision is, whether the suit is cognizable in the particular District Court in which it was brought.

In distributing the jurisdiction conferred in general terms upon the District Courts, the code declares, in § 51, that, "except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." If this section be applicable to suits which are local in their nature, as well as to such as are transitory (as to which see *Casey* v. *Adams*, 102 U. S. 66; *Greeley* v. *Lowe*, 155 U. S. 58; *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105; *Kentucky Coal Lands Co.* v. *Mineral Development Co.*, 191 Fed. Rep. 899, 915), it is clear that the District Court in which the suit was brought cannot entertain it, unless one of the six succeeding sections provides otherwise, or the appellee waives its personal privilege of being sued only in the district of its or the appellant's residence. *In re Moore*, 209 U. S. 490;

Western Loan Co. v. *Butte & Boston Mining Co.*, 210 U. S. 368.

The appellant relies upon § 57, one of the six succeeding sections, as adequately sustaining the jurisdiction. This section reads as follows:

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal prop-

erty against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

It will be perceived that this section not only plainly contemplates that a suit "to remove any incumbrance, lien or cloud upon the title to real or personal property" shall be cognizable in the District Court of the district wherein the property is located, but expressly provides for notifying the defendant by personal service outside the district, and, if that be impracticable, by publication. The section has been several times considered by this court, and, unless there be merit in an objection yet to be noticed, the decisions leave no doubt of its applicability to the present suit, even though both parties reside outside the district. *Greeley* v. *Lowe,* 155 U. S. 58; *Dick* v. *Foraker, Id.* 404; *Jellenik* v. *Huron Copper Co.,* 177 U. S. 1; *Citizens' Savings & Trust Co.* v. *Illinois Central Railroad Co.,* 205 U. S. 46; *Chase* v. *Wetzlar,* 225 U. S. 79.

The appellee, after asserting that each of the judgments is void upon its face if the attack upon it in the bill is well taken, calls attention to the general rule that a bill in equity does not lie to cancel, as a cloud upon title, a conveyance or instrument that is void upon its face, and then insists that § 57 must be regarded as adopted in the light of that rule and as not intended to displace it or to embrace a suit brought in opposition to it. The difficulty

with this contention is that it seeks to make the usages of courts of equity the sole test of what constitutes a cloud upon title, so as to bring a suit to remove it within the operation of § 57, and disregards the bearing which the state law rightly has upon the question. As long ago as 1839 this court had occasion, in *Clark* v. *Smith*, 13 Pet. 195, to consider whether a Federal court sitting in the State of Kentucky could entertain a suit to remove a cloud from the title to real property in that State where the right to such relief depended upon a remedial statute of the State; and in the opinion, which fully sustained the jurisdiction, the court pointed out that the nature of the right was such that it could only be enforced in a court of equity, and then said (p. 203): "Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature. . . . The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the Chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts; on the contrary, propriety and convenience suggest, that the practice should not materially differ, where titles to lands are the subjects of investigation. And such is the constant course of the Federal courts." The principle of that decision has been reaffirmed and applied in many cases, one being *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405. It was a suit in the Circuit Court for the District of Indiana to remove a cloud from title in virtue of a statute of that State, and the objection was interposed that the deed sought to be

canceled was void upon its face and therefore afforded no basis for such a suit in a Federal court. But this court pronounced the objection untenable, saying (p. 410): "While, therefore, the courts of equity may have generally adopted the rule that a deed, void upon its face, does not cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the legislation of the State in which the court sits to ascertain what constitutes a cloud upon the title, and what the state laws declare to be such the courts of the United States sitting in equity have jurisdiction to remove." Citing *Clark* v. *Smith, supra.* See also *Cowley* v. *Northern Pacific Railroad Co.*, 159 U. S. 569, 582. There are many state statutes of this type, and our decisions show that their enforcement in the Federal courts is subject to but three restrictions: 1. The case must be within the general class over which those courts are given jurisdiction. 2. A suit in equity does not lie in those courts where there is a plain, adequate and complete remedy at law. 3. In those courts there can be no commingling of legal and equitable remedies, or substitution of the latter for the former, whereby the constitutional right of trial by jury in actions at law is defeated. Judicial Code, §§ 24 (cl. 1) and 267; *Whitehead* v. *Shattuck*, 138 U. S. 146, 152, 156; *Greeley* v. *Lowe*, 155 U. S. 58, 75; *Wehrman* v. *Conklin, Id.* 314, 323; *Lawson* v. *United States Mining Co.*, 207 U. S. 1, 9.

We conclude that the provision in § 57 of the Judicial Code, respecting suits to remove clouds from title, was intended to embrace, and does embrace, suits of that nature when founded upon the remedial statutes of the several States, as well as when resting upon established usages and practice in equity.

The State of Mississippi has such a statute. Code of 1906, § 550. Although originally more restricted (Hutchinson's Code, p. 773; Rev. Code 1857, p. 541, art. 8), it has read as follows since 1871 (Rev. Code 1871, § 975):

"When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title canceled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not."

While we have not been referred to any decision of the Supreme Court of the State passing directly upon the question, whether a conveyance or other evidence of title void upon its face is within the purview of this statute, the decisions of that court brought to our attention show that it has treated the statute as embracing conveyances described as "void"—whether the invalidity was shown upon the face of the instrument being left uncertain—*Ezelle* v. *Parker*, 41 Mississippi, 520; *Wofford* v. *Bailey*, 57 Mississippi, 239; *Drysdale* v. *Biloxi Canning Co.*, 67 Mississippi, 534; *Preston* v. *Banks*, 71 Mississippi, 601; *Wildberger* v. *Puckett*, 78 Mississippi, 650; and also that it regards the statute as very comprehensive and materially enlarging existing equitable remedies. In *Huntington* v. *Allen*, 44 Mississippi, 654, 662, it was said: "The statute in reference to the removal of clouds from title, enlarges the principle upon which courts of equity were accustomed to administer relief. It is very broad, allowing the real owner in all cases, to apply for the cancellation of a deed or other evidence of title, which casts a cloud or suspicion on his title. . . . The terms used in the statute, expressive of the scope of the jurisdiction, viz., 'cloud,' 'doubt,' 'suspicion,' quite distinctly imply that the instrument which creates them is apparent rather than 'real;' is 'semblance' rather than substance; obscures rather than

destroys or defeats." In *Cook* v. *Friley*, 61 Mississippi, 1, 4, it was further said: "The statute . . . not only authorizes the real owner to file his bill to cancel a paper title, but also to remove the cloud, doubt or suspicion which may spring from the assertion of claim or pretense of right or title thereto by the defendant, who without any muniment of title may assert a claim or pretend to have right or title. The purpose was to give the real owner a remedy against one who asserts any claim or pretends to have any right or title to such owner's land, in analogy to the right of action by the canon law for jactitation of marriage. The real owner is entitled to protection against jactitation of title to the disparagement of his real ownership. He may bring into court one who asserts any claim or pretends to have any right or title to his land, and require him to vindicate his claim or submit to its extinguishment by decree of the court." And in *Peoples Bank* v. *West*, 67 Mississippi, 729, 740, the court concluded its opinion with the statement: "We know of no line by which the jurisdiction of the court is limited other than that prescribed by the law which confers it. When the complainant shows a perfect title, legal or equitable, and the title of the defendant is shown to be invalid, it is, in the nature of things, a cloud upon the title of complainant, and should be canceled."

In view of these decisions, we think the statute must be regarded as entitling the rightful owner of real property in the State to maintain a suit to dispel a cloud cast upon his title by an invalid deed or other instrument, even though it be one which, when tested by applicable legal principles, is void upon its face.

The judgments sought to be canceled as clouds upon the appellant's title were rendered by special courts of eminent domain, each composed of a justice of the peace and a jury. According to the statute controlling such proceedings (Miss. Code, 1906, c. 43) the special court is not

permitted to quash or dismiss the proceeding for want of jurisdiction or for any other reason, or to inquire whether the applicant has a right to condemn or whether the contemplated use is public, but "must proceed with the condemnation" (§§ 1862, 1865, 1866); and, while an appeal lies to the Circuit Court, a supersedeas is not permitted, and upon the appeal the Circuit Court is restricted, like the special court, to an ascertainment of the compensation to be paid to the owner (§ 1871). A form of judgment is prescribed, which contains blanks for a description of the property and a recital of the compensation awarded, and then declares: "Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application" (§ 1867). An affirmative provision to the same effect also appears in the statute (§ 1868). Considering these statutory provisions and § 17 of the state constitution which declares that the question whether the condemnation is for a public use shall be a judicial question, the Supreme Court of the State holds that "the only question which can be raised in the eminent domain court, and the only jurisdiction confided to it, is the jurisdiction to ascertain the amount of damage sustained by the party whose lands are sought to be taken;" that "a new issue, involving a new question and new pleadings, cannot be raised in the appellate tribunal, that is to say, in the circuit court;" that the owner "may litigate the right to take his property at any time before acceptance of the compensation, or before the waiver of his right to have the question of the use judicially determined;" that "neither the constitution nor the laws of the State provide any particular tribunal in which this question shall be determined, nor is it a matter of any particular concern in what court the question shall be settled, provided it be determined in that forum which is capable of deciding it," and that the

appropriate mode of litigating the question is by a suit in equity challenging the right of the condemnor to enter under the judgment of the court of eminent domain. *Vinegar Bend Lumber Co.* v. *Oak Grove & Georgetown Railroad Co.*, 89 Mississippi, 84, 107, 108, 110, 112. Thus it will be perceived that under the law of the State, as declared by its court of last resort, the judgment of a special court of eminent domain may be challenged by a bill in equity upon the ground that the condemnation is not for a public purpose. This being so, and the elements of Federal jurisdiction being present, the litigation may, of course, be had in a Federal court. One of the grounds upon which the judgments are challenged in the present bill is that the condemnation is not for a public purpose. If this ground be well taken, as to which we intimate no opinion, the judgments apparently confer upon the appellee a right in the appellant's right of way to which the appellee is not entitled.

We conclude that the suit is one to remove a cloud from title within the meaning of § 57 of the Judicial Code, and is cognizable in the court below, although neither of the parties resides in that district.

Decree reversed.

GILSON *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 207. Submitted May 6, 1914.—Decided June 8, 1914.

The settled rule of this court that the concurring findings of two courts below will not be disturbed, unless shown to be clearly erroneous, applies where the evidence is taken before an examiner. *Texas & Pacific Railway Co.* v. *Louisiana Railroad Commission*, 232 U. S. 338.

Quære, as to what is the effect on a commuted homestead entry under § 2301, Rev. Stat., of an agreement for alienation made after entry and before commutation; and see *Bailey* v. *Sanders*, 228 U. S. 603. 185 Fed. Rep. 484, affirmed.

THE facts, which involve the validity of a patent of the United States for a tract of land issued under a homestead entry, are stated in the opinion.

Mr. Wade H. Ellis, Mr. Ira P. Englehart, Mr. Allen S. Davis and *Mr. George B. Holden* for appellant:

The evidence having all been taken before a special master, the rule that appellate courts will give great weight to findings of trial courts on questions of fact does not apply.

After Landis had made his homestead filing, he had a right to make an agreement to sell the land and then commute his entry and purchase the land. He did not make final proof under the homestead statute, but purchased the land under § 2301 of Revised Statutes. *Adams* v. *Church*, 193 U. S. 510; *Williamson* v. *United States*, 207 U. S. 425.

The evidence is insufficient to justify the conclusion that there was any agreement between Landis and Gilson before Landis filed on the land that Landis was to sell the land to Gilson. Even though Landis was guilty of fraud, there is insufficient evidence that Gilson was a party thereto to authorize cancellation of patent after title thereto has vested in him.

Mr. Assistant Attorney General Knaebel and *Mr. S. W. Williams* for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an equity action brought by the United States against appellant to cancel a patent issued to one Daniel

Landis for a tract of one hundred and twenty acres of land in Yakima County, in the State of Washington, afterwards conveyed by Landis to appellant. Landis made a homestead entry in November, 1899, under § 2289 of the Revised Statutes as amended by act of March 3, 1891, c. 561, 26 Stat. 1095, 1098; in November, 1902, he commuted the entry and purchased the land under § 2301 as amended by the same act; and in July, 1903, he received a patent. Upon the day on which he made the commutation entry he gave a mortgage upon the land to appellant, and from that date ceased to live upon it, and as soon as the patent was issued he made the conveyance to appellant. The grounds of the action were: that Landis did not enter the land in good faith, but for the purpose and with the intent of acquiring title to it for appellant and at his instigation; that the residence and improvements were not sufficient; that the affidavit upon which Landis' original application was allowed was false and fraudulent, in that he did not make the application in good faith for the purpose of actual settlement and cultivation, but made it for the benefit of appellant, with whom the entryman was then acting in collusion for the purpose of giving to appellant the benefit of the entry; that the proof of settlement and cultivation offered in support of the commutation entry was false and fraudulent, in that the entryman had not made settlement in November, 1899, or at any other time, had not built a house, except a partially completed shanty, had not resided on the land, and had not broken thirteen acres and cultivated three acres as alleged in his final proofs; and that the statement made in his affidavit that he had not alienated any part of the land was also false, in that he had alienated or agreed to alienate it to appellant.

The trial court found that Landis made the homestead entry at appellant's instigation and for his benefit; that the evidence on which the register and receiver allowed

the commutation entry included sworn statements by Landis and two witnesses to the effect that the claimant had lived continuously on the land and made improvements, including a corral and chicken house, and that he had cultivated three acres for three seasons; that this was a false statement, there having been no plowing or cultivation except during the third year; that the land was dry sage-brush land, not productive without irrigation; that Landis made only a pretence of settlement and a show of improving the land, in order to satisfy the scruples of the witnesses upon whom he depended to make final proof; and further, that appellant was cognizant of every detail of the transaction from its inception to the issuance of patent, and, indeed, directed the proceedings at every step, and therefore could not claim to be a *bona fide* purchaser.

The Circuit Court of Appeals concurred in this view of the facts, and therefore sustained the conclusion reached by the trial court that the patent should be canceled, without finding it necessary to consider the question of law, suggested by appellant, that inasmuch as final proof was not made under § 2291 but under § 2301 of the Revised Statutes, the fact that the claimant had made an agreement before commutation to convey the land to another would not affect the validity of the title obtained from the United States, because § 2301 prescribes as requisite to commutation, proof only that the entryman has made settlement, cultivation, and residence for fourteen months, and does not require him to make oath that he has not alienated any portion of the land. The decree was affirmed (185 Fed. Rep. 484), and the present appeal was taken.

Upon the question of fact as to the fraudulent nature of the proof upon which the commutation entry was allowed, we have the concurring findings of two courts, which, according to the settled rule, will not be disturbed by this court unless clearly shown to be erroneous. *Stuart*

v. *Hayden*, 169 U. S. 1, 14; *Towson* v. *Moore*, 173 U. S. 17, 24; *Dun* v. *Lumbermen's Credit Assoc.*, 209 U. S. 20, 23; *Washington Securities Co.* v. *United States*, *ante*, p. 76.

In behalf of appellant it is urged that this rule does not apply where the evidence is taken before an examiner, as was done in this case. The rule, however, is subject to no such exception; indeed, prior to the adoption of the new Equity Rules (226 U. S., Appendix, Rule 46), the evidence in equity actions was usually taken before a master or examiner. And in *Texas & Pacific Ry.* v. *Louisiana Railroad Commission*, 232 U. S. 338, where the findings of the special master who heard the testimony were set aside by the Circuit Court, and the conclusions of that court were concurred in by the Circuit Court of Appeals, we deemed the case a proper one for applying the general rule.

In the present case, not only does the argument submitted in behalf of appellant fail to show clear ground for disturbing the concurring findings of the two courts, but it raises no reasonable doubt of their correctness.

This renders it unnecessary to deal with the question raised as to the effect of an agreement for alienation made after entry and before commutation. However, it is settled adversely to the contention of appellant by our recent decision in *Bailey* v. *Sanders*, 228 U. S. 603, 608.

Decree affirmed.